IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Satish Vs. State of Rajasthan
(D.B. Criminal Appeal No.644/2003)

2. Vijendra Vs. State of Rajasthan
(D.B. Criminal Jail Appeal No.959/2003)

D. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 18-4-2003 in Sessions Case No.64/2001(26/2001) passed by Shri Rameshwar Vyas, RHJS, Additional Sessions Judge (Fast Track) Kishangarh Bas (Alwar).

Date of Judgment: May 31, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. S.R.Bajwa, Sr. Advocate with] for appellant Satish.
Mr. V.R.Bajwa]
Mr. Brijesh Sharma, Amicus Curiae, for appellant Vijendra.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Challenge in these appeals is to the judgment dated April 18, 2003 of the learned Additional Sessions Judge (Fast Track) Kishangarh Bas (Alwar) whereby the appellants were convicted and sentenced as under:-

U/s.302 IPC:

Both to suffer imprisonment for life and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for three years.

U/s.364 IPC:

Both to suffer rigorous imprisonment for ten years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for two years.

U/s.201 IPC:

Both to suffer rigorous imprisonment for five years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

The substantive sentences were ordered to run concurrently.

FACTS:

2. On May 9, 2000 at 8.30 AM informant Umesh Kumar (Pw.2) lodged a written report (Ex.P-9) at Police Station Kotkasim to the effect that he was resident of village Katopur. On May 8, 2000 he was sleeping along with other family members. Around 11.30 PM he woke up and came out side in the Court-yard. He then found that his son Dilawar @ Kalu, aged 6 years, was missing. He looked around for his son and inquired from other family members but could not find the boy. Inquiries made by him and other family members in and around the village about the boy were also in vain. He had suspicion that the incident might have been done by Vedpal with whom he had old enmity and who was recently released on bail and visited the village. On that report a case was registered at PS Kotkasim. The Investigating Agency embarked upon investigation. During the course of investigation, the place from where the boy was taken away, was inspected and site plan was prepared. Informant Umesh Kumar submitted a letter, which was also seized by the police. Statements of Umesh, Sunita and Santra were recorded by police. With passage of time, during the course of investigation, on December 30, 2000 the appellant was arrested by the police. The appellant allegedly gave information about dead body of child having buried, seven months back, in the bed of River Sabi about one and half kilometers from village Katopur. At the instance of said information dead body of the boy was exhumed from the relevant spot along with his

clothes. Inquest proceedings of the dead body were conducted. Site plan of place, from where dead body was exhumed was prepared. Dead body was subjected to post mortem examination. Appellant Vijendra was also arrested. The skull of the dead body, which was kept safe, was seized by the police. At the instance of appellant Satish, a spade was recovered and seized. Co-accused Om Prakash was arrested on January 7, 2001. He moved an application before the Chief Judicial Magistrate Alwar for becoming approver and learned Chief Judicial Magistrate allowed the application and Om Prakash was made approver. Thereafter statements of Om Prakash were recorded by the Additional Chief Judicial Magistrate Alwar. After completion of investigation charge sheet was filed. In due course the case was committed to the court of Additional Sessions Judge No.1, Kishangarh Bas. Thereafter it was made over to learned Additional Sessions Judge (Fast Track) Kishangarh Bas. Charges under sections 363, 364, 364A, 302, 120B and 201 IPC were framed against the accused, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 41 witnesses. In the explanation under Sec.313 Cr.P.C., the appellants claimed innocence and stated that complainant Umesh himself, in conspiracy with his second wife, killed the child by administering poison and disposed of the body with the help of Om Prakash. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above.

RIVAL CONTENTIONS:

3. Learned Senior Counsel's main contention was that the Chief Judicial Magistrate Alwar had failed to comply with the mandatory direction

contained in clause (a) of sub-section (4) of Section 306 CrPC, as no statement of approver was recorded by the Chief Judicial Magistrate during the committal proceedings, which vitiates the committal of the accused to court of Additional Sessions Judge No.1 Kishangarh bas and consequently the trial by the Additional Sessions Judge (Fast Track) Kishangarh bas. Learned Senior Counsel further canvassed that the appellants are innocent persons and they have not committed any offence. They have been falsely implicated at the instance of complainant. The appellants were arrested after an interregnum of eight months without any clinching evidence to reflect the complicity of appellant in the present case. The dead body, which was allegedly recovered, was nothing but a bundle of bones and in such a situation the fact that it was of Dilawar @ Kalu has not been proved at all. The cause of death of corpse, which was allegedly recovered, has also not been established by medical evidence. In such situation it could not be said that dead body recovered, whatsoever it was, had died a homicidal death. None of the prosecution witnesses have endeavoured to divulge the fact about the cloths which Dilawar @ Kalu was wearing when he had allegedly disappeared. No motive has been brought to the fore by the prosecution. So called recovery of spade, at the instance of appellant, has not been proved with the aid of cogent and convincing evidence. There is no mention of any kind of suspicion against appellants by complainant in the FIR. Reliance was placed on various authorities that shall be considered at the appropriate juncture.

4. Per contra learned Public Prosecutor urged as under:-

(1) Section 306(4) CrPC nowhere provides that:

(a) approver's evidence cannot be recorded on the date or

prior to submission of the charge sheet.

(b) The accused is required to be summoned before recording the statement of the approver.

(2) In any case under section 465 CrPC after trial accused ought not to have been permitted to raise the contention that there was such an omission in recording the statement of approver.

SECTIONS 306 AND 307 CRPC:

5. In order to appreciate the rival contentions it would be appropriate to refer to the relevant part of Sections 306 and 307 CrPC which reads as under:-

"306. Tender of pardon to accomplice-

(1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or tying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full an true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) x x x

(3) x x x

(4) Every person accepting a tender of pardon made under sub-section (1)-

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

5. x x x

307. Power to direct tender of pardon-

At any time after commitment of a case but before judgment is passed, the Court to which the commitment is made may, with a view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender a pardon on the same condition to such person."

6. Their Lordships of the Supreme Court had occasion to consider Section 306 in State of Himachal Pradesh V. Surinder Mohan (AIR 2000 SC 1862). (Para 11)

"11. From the aforesaid Section 306 it can be stated that-

(1) the purpose of the Section is to obtain the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence `during investigation, inquiry or trial':

(2) the Chief Judicial Magistrate or Metropolitan Magistrate is empowered to tender a pardon to such person `at any stage of investigation or inquiry into or the trial of the offence;

(3) the condition for tender of such pardon is that the person is to make a full and true disclosure of the whole circumstances within his knowledge relating to the offence;

(4) a person accepting pardon under sub-section (1) is to be `examined' as a witness in the Court of Magistrate taking cognizance of the offence and in subsequent trial, if any;

(5) Further, if the case is committed for trial to the Court of Session, Section 307 empowers the Sessions Court trying the case to tender a pardon on the same conditions to such person before the judgment is passed."

7. In A.Devendran Vs. State of Tamil Nadu (1998)11 SCC 720, the Apex Court considered the question as to whether non compliance of Section 306(4) on account of non-examination of an approver as a witness

after granting him pardon would vitiate the entire proceeding. In that case, it was contended that the object and purpose engrafted in clause (a) of sub-section (4) of Section 306 is to provide a safeguard to the accused who can cross-examine even at the preliminary stage on knowing the evidence of the approver against him and can impeach the said testimony when the approver is examined in court during trial. The Apex Court, dealing with the said contention, held that a combined reading of sub-section (4) of Section 306 and Section 307 would make it clear that in a case exclusively triable by the Session Court if pardon is tendered to an accomplice and he is taken as an approver before commitment then compliance of sub-section (4) of Section 306 is mandatory. The corollary is that non-compliance of such mandatory requirements would vitiate the proceedings.

8. In Suresh Chandra Bahri's case (AIR 1994 SC 2420) the Hon'ble Supreme Court observed that the object and purpose of enacting sub-section (4) of Section 306 is obviously intended to provide a safeguard to the accused in as much as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him, but he is also afforded an opportunity to meet with the evidence of the approver before the Committing Court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy, in case there are any contradictions or improvements made by him during his evidence at the trial. The Apex Court pointed out the utility of examination of the approver at two stages.

9. In Sanjay Gandhi Vs. Union of India (AIR 1978 SC 514) the

Apex Court indicated in para 2 thus:-

> "We have heard counsel on both sides and proceed to elucidate certain clear propositions under the new Code bearing upon the committal of cases where the offence is triable exclusively by the Court of Sessions. The Committing Magistrate in such cases has no power to discharge the accused. Nor has he power to take oral evidence save where a specific provision like S.306 enjoins. From this it follows that the argument that the accused has to cross examine is out of bounds for the Magistrate, save in the case of approvers. No examination in chief, no cross examination."
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> (Emphasis supplied)

10. In Sardar Iqbal Singh Vs. State (1977)4 SCC 536, it was indicated in para 6 thus:-

> "If by enacting sub-section (2B) in 1955 in the Code of Criminal Procedure the Legislature sought to curb the power of taking cognizance given to the Special Judge by Section 8(1) of the Criminal Law (Amendment) Act, the Legislature would have expressed its intention clearly. Moreover, the fact that the approver's evidence can be tested against any previous statement does not make any material difference to the detriment of the accused transgressing Article 14 of the Constitution. The Special Judge in any case will have to apply the well established tests for appreciating the accomplice's evidence. There is not substantive or qualitative difference between the two procedures when a witness is examined once or twice and it would not make such a substantial difference that one could be described as more drastic than the other."

11. In the present appeals, as already noticed, approver Om Prakash was arrested on January 7, 2001. While in custody, he submitted an application (Ex.P-43) to CJM Alwar on January 19, 2001 through SHO,

expressing his intention to make a true disclosure of the facts regarding the incident. The application was taken up by CJM and it was explained to the approver that his statement could be used against him also. CJM Alwar vide order Ex.P-44 granted pardon to approver on February 15, 2001 under Section 306 CrPC and directed ACJM Alwar to record the statement of approver under Section 306 CrPC. Pursuant to the direction of CJM, application Ex.P-43 for recording the statements of approver was moved by SHO PS Kotkasim before the ACJM Alwar, who directed Jailor of Sub-jail Kishangarh bas to produce approver Om Prakash in the Court on February 20, 2001. Approver Om Prakash was produced in the Court of ACJM on the said date and his statements under Section 306 CrPC (Ex.P-8) were recorded. Sh. Ram Babu Chaturvedi ACJM (Pw.19) was examined by the prosecution to exhibit the relevant documents. At the top of the statement (Ex.P-8) Section 306(4) CrPC was clearly mentioned.

12. It is contended by learned Senior Counsel that non compliance of Section 306(4) was evidently made as the charge sheet was filed on March 25, 2001 but the statement of approver was recorded on February 20, 2001 much before filing of charge sheet and thus whole trial stood vitiated. In order to appreciate this submission we have closely scrutinised sub-section (4) of Section 306 which specifically provides that the person accepting a pardon should be examined as a witness in the Magistrate's Court and the subsequent trial what is mandatory is that he should be examined as a witness and the provision for an examination by Magistrate taking cognizance of an offence is not for the purpose of providing an earlier statement on oath for the purpose of cross examination by the accused at ultimate trial, but to have an earliest possible statement on oath by

the approver for the purpose of knowing the truth. Object of examination of approver at two stages is to provide opportunity to the accused to meet with the evidence of the approver before the Committing Court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy.

13. In the case on hand, as noticed earlier, the Chief Judicial Magistrate after granting pardon to approver Om Prakash directed ACJM to record the statement of approver under sub-section (4) of Section 306. Learned Magistrate thereafter recorded the statement of approver on February 20, 2001. It is no doubt true that charge sheet was filed on March 25, 2001 but copy of statement of approver was supplied to the accused appellants. In such a situation we find ourselves unable to accept the contention of learned Senior counsel that even after the statement of approver was recorded by the ACJM under sub-section (4) of Section 306 it was incumbent on the Committing Magistrate to again record the statement of approver. Examination of approver at three stages is not envisaged in the scheme of Section 306. The position would have been different had the statement of approver recorded prior to granting him pardon but after granting pardon the approver became witness and Magistrate taking cognizance had every authority to record the statement of approver under sub-section (4) of section 306 even before filing of the charge sheet. It was not necessary for the Committing Court to again record the statement of approver and the case could be committed under section 209 Cr.P.C. to the Court of Session along with the statement of approver recorded by the ACJM under sub-section (4) of section 306.

14. Approver Om Prakash was examined as (Pw.1) at the trial and he was subjected to lengthy cross examination. It is well settled that approver is a competent witness but his evidence has to satisfy a double test. The first test is that his evidence has to be reliable and the second is that his evidence must receive corroboration. It is however possible in exceptional cases and under special circumstances that the court could notwithstanding the rule of prudence and caution, give credit to the accomplice's testimony against the accused, even without corroboration, and in such cases, section 133 of the Evidence Act provides that a conviction is not illegal merely because it proceeds upon such uncorroborated testimony of an accomplice. The combined effect of Sections 133 and 114 illustration (b) of the Evidence Act is that though the conviction of an accused on the testimony of an accomplice can not be said to be illegal, yet the court will as a matter of practice not accept the evidence of such a witness without corroboration in material particulars. It is not strictly necessary, that the corroboration should be afforded only by direct evidence, it may be provided by circumstantial evidence. The circumstantial evidence should be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with the theory about the innocence of the accused.

15. The circumstances relied upon by the learned trial court in establishing the guilt of the appellants are as under:-

(A) <u>Recovery of dead body on the basis of disclosure statement of appellant Satish:</u>

This fact is not disputed that Kalu @ Dilawar was eloped in the

night of May 8, 2000. He was vigorously searched and on December 30, 2000 when the dead body got recovered it was revealed for the first time that Kalu was no more. Umesh Kumar (Pw.2) lodged FIR with the Police Station Kotkasim. Appellant Satish gave information under Section 27 of the Evidence Act. This information was recorded by Rajendra Prasad IO (Pw.41) in the memo Ex.P-21 on the basis of disclosure statement of Satish, Rajendra Prasad along with Satish reached at the place where the dead body got buried. With the help of spade Satish dug the pit out of which skeleton got recovered vide recovery memo (Ex.P-20). Vishambhar Dayal (Pw.6) was the Motbir of recovery of skeleton and he put his signatures on the memo Ex.P-20. Sunita (Pw.3) also put her signatures on Ex.P-20. Dr. P.C.Vyas (Pw.14), who conducted autopsy on the dead body deposed that it was human skeleton and from the teeth and other bones the estimated age of the deceased was 6 to 7 years. One Tagdi along with silver Ghungroos was found wrapped on the skeleton. It was identified by Sunita (Pw.3) as belonging to Kalu.

(B) <u>Information regarding place of abduction etc.</u>

Appellants Satish and Vijendra gave information about the place from where they kidnapped Kalu. Memos wherein information got recorded were drawn and exhibited as Ex.P-69 and Ex.P-68. Pursuant to the information site plans Ex.P-28 and Ex.P-29 were drawn. Pieces of rope with the help of which Kalu was hanged in the well got recovered at the instance of appellant

Satish and Vijendra and necessary memos were drawn.

16. Approver Om Prakash (Pw.1) in his deposition stated that appellants Satish and Vijendra called him and disclosed that they wanted to kidnap a boy. They asked him to keep the boy for two three days in a secret place. On being asked by Om Prakash as to who was the father of the boy, Satish replied that name of boy's father was Umesh from whom they wanted a sum of Rupees one lakh as ransom. Out of that money they promised to pay a sum of Rupees ten thousand to Om Prakash. On June 9, 2000 Vijendra met Om Prakash and informed him that they had kidnapped Umesh's son. After few days Satish informed Om Prakash that they had killed the boy by hanging him in a well and buried him in Sabi River. Having closely scanned the testimony of Om Prakash we find that it could not be shattered in the cross examination.

17. In the ultimate analysis, we find that the circumstantial evidence adduced by the prosecution in the instant case unmistakably lead to the inference of guilt of the appellants and inconsistent with the theory about the innocence of the appellants. The appellants, in our opinion, have been rightly convicted and sentenced by the learned trial court.

18. For these reasons, we find no merit in the appeals and they accordingly stand dismissed.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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